In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1456

MELVIN LEMMONS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION

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CORRECTION OF STATEMENT OF FACTS

The office furniture was situated in the rear portion of the north side of the store between clothing racks and the toilet totally unrestricted and within a few feet of two dressing rooms.

The handguns seized were all legally registered and returned upon request.

No narcotic paraphernalia was ever introduced or seen. Accordingly, such reference is not properly a part of this record.

Petitioner was indeed arrested upon entry of the premises, strip searched and the keys to his automobile were

seized. His automobile was searched without authority or consent.

TRAVERSE GOVERNMENT ARGUMENTS

1. The government suggests that the sequence of events preceding petitioner's arrest is not significant, arguing that since the only evidence derived from petitioner's arrest were fingerprints. However, the government apparently overlooks the fact that the fingerprint evidence is the *only* connecting link in the case. Without it, a conviction of petitioner would be beyond the remotest imagination.

Since it is clear that the fingerprint evidence is a product of petitioner's arrest, the legality of that arrest determines the admissibility of the fingerprints. *Whiteley* v. *Warden,* 401 U.S. 560, 28 L. Ed. 2d 306, 91 S. Ct. 1031; *Beck* v. *Ohio,* 379 U.S. 83, 13 L. Ed. 2d 142, 85 S. Ct. 1223; *Wong Sun* v. *United States,* 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407. Indeed, this was the very problem that perplexed the Court of Appeals when the court opined, "We regard the probable cause issue in this case a close one." (App. 18a) Otherwise, reversal of the district court would have been imminent.

Certainly, the time of the arrest is pertinent in determining whether probable cause existed at the precise moment to make said arrest. *Brinegar* v. *United States,* 338 U.S. 160.

As we analyze the decision of the Court of Appeals, the court equivocally sanctions *discriminate* arrests of certain citizens in some situations wherein no probable cause to make such arrest exists. The court ruled that although we are finding that probable cause to arrest exists *in this case,* "we do not give blanket approval to the *indiscriminate* arrest of store proprietors solely because contraband is found on the premises." (App. 19a) (Emphasis added)

It is impossible to reconcile the court's ultimate ruling with its expressed logic, because it is undisputed that the only fact known about petitioner to support his arrest was his stockholder's interest in the corporation. This, the Court of Appeals opined is not generally sufficient probable cause to arrest, except in this particular case.

To this extent, we agree with the government's argument that the sequence of events before the arrest would not be relevant to the decision of the Court of Appeals, because the court makes it clear that knowledge of the proprietary interest in the premises and discovery of contraband thereon is not, in and of itself, probable cause to arrest.

Since this is the exact position of the petitioner at the time of his arrest, his arrest was obviously illegal by the very logic employed by the Court of Appeals.

2. The government's assertion that Sgt. Nichols obtained two fingerprint lifts from two of sixteen tinfoils is not supported by any record evidence. Sgt. Mowery testified that he had no actual knowledge from whence the lifts came. (See Pet. 20-21) Moreover, there was no identification of the specific tinfoils involved, or that the two involved, in fact, contained heroin.

The aforementioned facts become more aggravated by the unaccountability of the laboratory file for a period of six (6) months away from where it would normally have been kept, plus prior assertions that petitioner's prints were extracted from a different source. (Manila envelope Tr. 214, App. 147)

Although we concede that Sgt. Mowery's testimony was directed to his examination of the *lifts,* however, the missing link revolves around the source of extraction prior to the lifts, which Mowery had no personal knowledge of. (Tr. 259)

Contrary to the government's declaration as to the sufficiency of the record keeping in this cause, a mere statement of a witness that records were kept in the ordinary course of business is insufficient to support admissibility. The court must consider whether there is anything about a business record which detracts from its trustworthiness. *United States* v. *Teague,* 445 F. 2d 114 (CA 7, 1971) Moreover, there must be sufficient testimony to explain how the record was prepared. *United States* v. *Whitaker,* 372 F. Supp. 154, 167 (M.D., Pa., 1974) The person identifying the record must be in a position to testify to the process.

It can hardly be said that the record in the instant case was kept in the ordinary course of business wherein no one could account for its possession and whereabouts for a period of six (6) months before trial.

Obviously, the government's reliance on *Dutton* v. *Evans,* 100 U.S. 74 and *California* v. *Green,* 399 U.S. 149 (Gov. 6 and 7) is misplaced. In *Green,* the essential witness was present, but changed his story, which was certainly subject to cross examination; thereby, satisfying the confrontation clause. *Evans,* was a five to four decision of this court that in no way involved the admissibility of a business record. Moreover, the court noted in *Evans* that the complained of declaration against interest was simply supportive of a plethora of other evidence and thereby, at most, was only harmless error.

However, the complained of evidence in the instant case is outcome determinative, which makes the right of confrontation more important to the accused. *Phillips* v. *Neil,* 452 F. 2d 337, 347 (CA 6, 1971 discussing both *Green* and *Evans*) ; *United States* v. *Burruss,* 418 F. 2d 677 (CA 4, 1969) ; *United States* v. *Shiver,* 414 F. 2d 461 (CA 5, 1969) ; *United States* v. *Graham,* 391 F. 2d 439, 448 (CA 6, 1968) ; *United States* v. *Blake,* 488 F. 2d 101 (CA 5, 1973) .

Moreover, the government's argument as to the admissibility of the business record, in the instant case, is inappropriate, because neither the business record, nor Sgt. Nichol s report were ever received by the district court as evidence. The court acted upon the *testimony* of Sgt. Mowery, which was clearly hearsay.

Finally, the right to cross examine the essential witness against petitioner, in the instant case, was non-existent. Certainly, petitioner was entitled to cross examine Sgt. Nichols as to the source of his extractions of the lifts and whether he had informed the government, prior to the evidentiary hearing that petitioner's prints were extracted from a Manila envelope as opposd to tinfoil strips, or if he claimed that petitioner's prints were extracted from two (2) of sixteen (16) tinfoils, which two, and whether those specific two in fact contained heroin. Moreover, petitioner was entitled to cross examine about the presence of other prints and the freshness of prints observed. *Davis* v. *Alaska,* 415 U.S. 308, 316, 317, 318 (1974) ; *Collon* v. *United States,* 426 F. 2d 939 (CA 6, 1970) .

In attempting to cross examine Sgt. Mowery on these pertinent points, he successfully dodged the questions by simply relating that all he did was verify another man's work. This sort of answer to questions which directly

strikes at the heart of crucial evidence does not satisfy the confrontation clause of the Sixth Amendment.

This right becomes even more important in such as the instant case where the single item of incriminating evidence could manifest innocence as well as guilt. *Collon* v. *United States*, supra.

Petitioner further lost the right to cross examine the principal witness against him, about the presence of other prints, which were acknowledged, why those prints were never determined and to show by other experts that Sgt. Nichols' findings were inaccurate.

3. Contrary to the assertions of the government in this argument, there was no claim of entrapment. Petitioner always denied possession of the drugs through his plea of "not guilty." Moreover, the contention of the defense was that petitioner was framed Petitioner had never been convicted of a narcotic offense and although he was 33 years old at the time, his only prior conviction was for receiving and concealing stolen property.

Our argument momentarily abandons a demand for complete disclosure of the informant. We asked the court to privately examine the informant, in the interest of justice, since the court arbitrarily denied all requests for discovery and there could be no danger to the informant.

This, we contend, was a reasonable request in view of the defense theory (frameup) and the overall known facts of the case. (Rule 510[c] Federal Rules of Evidence) For example, this was a business place with at least five (5) employees on the premises at the time of the raid. Anyone of them could have been the informant and planted the drugs. Moreover, at the Evidentiary Hearing, government counsel said that petitioner's prints were on a Manila envelope and that *there were other identifiable prints on the contraband containers that were not determined.* Suppose that or those prints were the informant's. What explanation could he or she give for the presence of the prints in the file cabinet? Contrary to the government's argument, the informant could have been the actual possessor.

Government counsel's assertion that the informant did not witness or participate in the possession is inappropriate, until such time as it is determined who the informant was and whether the unidentified prints were his or hers. Certainly, if the informant was an employee on the premises at the time, he or she was a witness. Moreover, if the unidentified prints were the informant's, he or she was as much the possessor as the petitioner could possibly be. Petitioner could produce no evidence pro or con, not knowing who the informant was.

The trial court clearly suppressed any possibility of the defense to prepare for trial by denying all necessary discovery.

4. Not only did the district court rely on facts adduced at the Evidentiary Hearing, as was pointed out (Pet. 17-18), the court considered *Sgt. Nichols' report,* which was never received as evidence as part of the business record, which would have been the "best evidence" of Nichols' findings. (Although, we contend to be inadmissible in this case). The testimony of Sgt. Mowery as to Sgt. Nichols examination was clear hearsay not recognized by any exception to the "hearsay rule" and could not properly be considered by the trial court as having probative value as to the guilt or innocence of the petitioner.

CONCLUSION

For the reasons herein asserted and those expressed in the original petition for certiorari, petitioner respectfully submits that his petition should be granted.

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